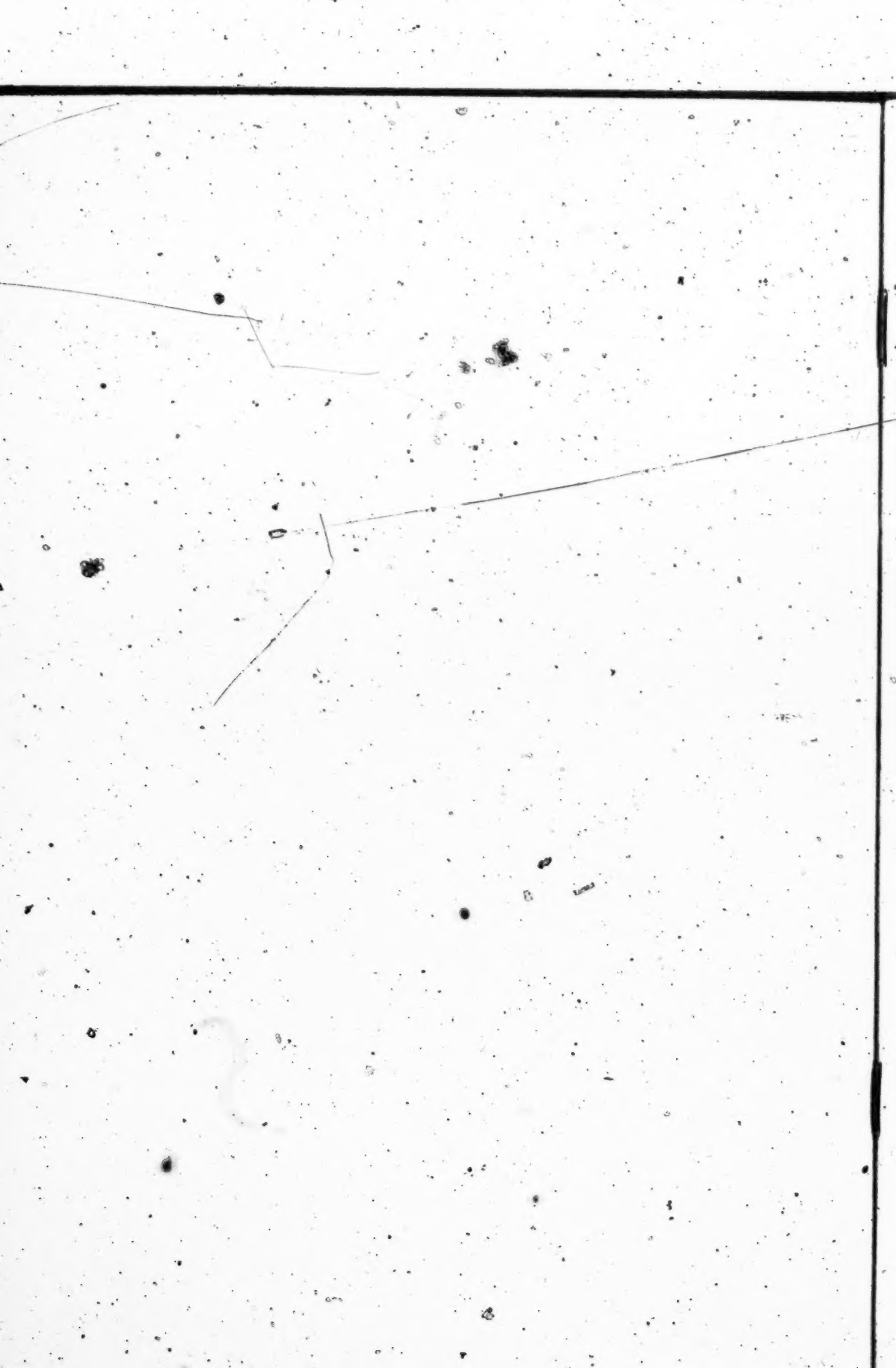

SUPREME COURT, U. S.

FILED

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No. 691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NELSON A. ROCKEFELLER, as Governor of the State of New York, LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Defendants-Appellants,

v.

DAVID I. WELLS and DONALD S. HARRINGTON, individually and as Acting Chairman of the State Committee of the Liberal Party of the State of New York,

Plaintiffs-Appellees.

BRIEF OF PLAINTIFFS-APPELLEES

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BRIEF OF PLAINTIFFS-APPELLEES

Preliminary Statement

This Brief is submitted by plaintiffs-appellees in opposition to the appeal filed by the defendants-appellants and docketed in this Court on the 6th day of October, 1967. It will be the position of plaintiffs-appellees in this Brief that the appeal filed herein is wholly without merit and that the issues presented are clear and have been repeatedly determined by this Court, and, accordingly, present no novel or

constitutional question which this Court should hear on appeal.

The jurisdictional statement of defendants-appellants properly contains the opinion below, the statute involved, the questions presented, and the statement of the case.

Issue is taken, however, with the contention of defendants-appellants, that the questions presented are substantial.

Defendants-appellants raise basically three points on appeal. They contend:

A. That the challenged State statute is not unconstitutional since the Congressional districting thereunder does not contain a variation of more than 15% (defendants-appellants contend that a maximum variation of up to 15% from the State's average district population is permissible, yet they blandly concede that there is a maximum variation of 15.1% from the average, occurring in the 12th Congressional District in Kings County)—see (p. "7" of defendants-appellants' Jurisdictional Statement). It is respectfully submitted that based on this point alone, even if we were to concede that a maximum variation of 15% is permissible, which we do not, the challenged statute is unconstitutional and invalid, warranting an affirmance of the order, judgment and decree below.

B. That plaintiffs lack standing to bring the within action.

C. That the remedy imposed by the District Court is unfair in that the District Court erred in refusing to permit the existing Congressional district lines to remain in effect in the State of New York until the 1970 census figures are available.

In the within Brief, plaintiffs-appellees will deal *seriatim* with the points raised by defendants-appellants.

POINT I

The claim that the challenged statute is constitutional in that the maximum variation in Congressional Districts in the State of New York does not exceed 15% of the average is wholly erroneous and without foundation.

Initially, for the sake of emphasis, plaintiffs-appellees again wish to call this Court's attention to the concession made by the defendants-appellants that there is a variation of 15.1% from the average, occurring in the 12th Congressional District in Kings County.

The State further contends that the New York Legislature's action, in 1961, in enacting the challenged statute, was "a good faith effort .... to make substantial equality of population the controlling standard in the establishment of Congressional lines" (p. 6).

It is the position of plaintiffs-appellees that whether or not the 1961 action represented "a good faith effort," that action clearly violates the standards of equality which have since been made clear in *Wesberry* v. *Sanders*, 376 U. S. 1, and subsequent cases. The State's argument is analogous to a plea that a separate-but-equal school facility established before 1954, be permitted to continue in existence because, at the time of its establishment, it represented "a good faith effort" to conform to the law as it was then understood.

The State (p. 6) further refers to the Interim Report of the Joint Legislative Committee on Reapportionment (1961 Legis. Document No. 45). That Report began with the words: "In the absence of Federal . . . constitutional . . . standards governing the creation of Congressional districts. . . ." But this very premise was erroneous. This Court clearly pointed out in *Wesberry* that there *is* a Federal Constitutional standard, that set forth in Article I,

Section 2, and that standard is one of substantial equality of population. We need not, of course, point out that Article I, Section 2 was an integral part of the federal Constitution in 1961, when the statute here under attack was enacted, just as it had been for more than a century and a half prior to that date. The earlier failure of the legislatures of New York, and other states to heed that constitutional provision and the earlier failure of the federal courts to enforce it certainly do not excuse its continued violation now, almost three and one-half years after this Court explicitly and unequivocally stated its meaning.

The legislative committee, in this same 1961 report, also expressed the view that a maximum variation of 15% "would preserve substantial equality of population . . ." Two recent decisions suffice for comment on this point. In *Jones* v. *Falcey*, 48 N. J. 25 (S. C. N. J., July 23, 1966), the New Jersey Supreme Court said that "The Constitution . . . does not contemplate that there is a range of deviation within which a State may maneuver, with or without reason." And in *Preisler* v. *Secretary of State of Missouri*, 257 Fed. Supp. 953, aff'd as *Kirkpatrick* v. *Preisler*, 385 U. S. 450, the District Court said: "Our decision in this case . . . does not rest on whether or not (any) members of the 1965 General Assembly did or did not establish a policy 'to stay within an arbitrary figure of 10%. . . .' The only constitutionally permissible policy that could have been followed . . . is that set forth in Article I, Section 2 of the Constitution of the United States, as that section has been defined by the United States Supreme Court in *Wesberry* v. *Sanders*."

The State (p. 7) further indicates that a 15% standard was advocated by the American Political Science Association and by former President Truman. Yet it must be obvious that such views were merely expressions of opinion without any legal or constitutional significance; further-

more, in both instances, the indicated position was formulated prior to *Wesberry* and the other fair representation rulings of recent years.

In *Swann* v. *Adams,* 385 U. S. 440, 444, Mr. Justice White wrote that this Court in *Reynolds* v. *Sims,* 377 U. S. 533, had indicated "that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines." But the State, in the present case, has at no point proven or even attempted to prove that any of the many gross departures from reasonable population equality established by the 1961 statute were based on any such considerations.

In the second full paragraph on p. "8", the State makes two points: first, that *Swann* v. *Adams,* 385 U. S. 440, is not analogous to the present case because the statute invalidated in that case involved population variations which were somewhat greater than those established by the New York statute here under attack; and second, that the *Swann* ruling dealt with what the State has, on previous occasions in this case referred to as a "curative" statute (one enacted after a pre-*Reynolds* statute had been invalidated), whereas this case involves an "original" statute (that is, one enacted prior to this Court's apportionment and districting decisions of 1964).

With regard to the argument that the disparities dealt with in *Swann* were greater than those involved here, we note, first, that in *Reynolds,* this Court wrote that "more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in Congressional districting." In *Drum* v. *Seawell,* 250 F. Supp. 922, a federal district court struck down North Carolina's

Congressional districting statute for excessive deviation from equality at the very same time that it upheld the constitutionality of that State's legislative apportionment system, even though the latter encompassed a considerably *wider* numerical departure from equality than the former. (See also *Preisler* v. *Secretary of State of Missouri*, 257 F. Supp. 953, aff'd as *Kirkpatrick* v. *Preisler*, 385 U. S. 450.) But in addition we note that it has now become apparent that the controlling rule in both state legislative apportionment and Congressional districting cases is a rule of "rational justification": That except for *de minimis* variations, only those departures from equality which can be proven to have a rational and not otherwise unconstitutional basis will be tolerated. And in this connection we note again that the State, in this case, has at no point attempted to present any rational justification for the glaring departures from equality which were established under the New York statute.

With regard to the attempt to draw a distinction between this case and *Swann* on the grounds that a "curative" statute was involved in the latter case, it is our contention that such a distinction has no valid basis. Neither this nor any other federal court has, to our knowledge, ever drawn such a distinction, nor is there any reason why one should be drawn. The constitutional standards of equality which were made clear in *Wesberry, Reynolds* and subsequent rulings, apply with equal force to statutes whether enacted before or after 1964. The standards do not become stricter merely because a legislature may have flouted those standards two or three times previously. The New York Legislature's 1961 action must be judged by the same rules which apply to all other Congressional districting statutes, just as the Florida Legislature's 1966 action was judged in *Swann* by the same rules which apply to all other state legislative apportionment statutes.

POINT II

The claim that plaintiffs lack standing in this action is wholly without merit.

Initially it should be noted that the right of plaintiff, Donald S. Harrington, to bring this action as Acting Chairman of the State Committee of the Liberal Party of the State of New York, was at no time raised in the court below, either by way of motion or by way of argument.

The footnote referring to this point in the Jurisdictional Statement of defendants-appellants (p. 4) is the first reference to this matter. Defendants-appellants neither made any motion with respect to the right of Donald S. Harrington to proceed on behalf of the Liberal Party of the State of New York, nor was this question ever raised in argument. It is respectfully submitted that such failure constitutes a complete waiver of any such claim, even if it had merit, which we respectfully submit it does not. Moreover, an examination of the complaint on file and before this Court, reveals that plaintiff, Donald S. Harrington, has instituted action "individually and as Acting Chairman of the State Committee of the Liberal Party of the State of New York." (See caption as well as page "4" of complaint.) The complaint further states that the "Liberal Party is a duly constituted political party of the State of New York, as defined in Section 2, subd. 4 of the Election Law of the State of New York, having obtained more than 50,000 votes, to wit, 242,675 votes for its party condidate for governor at the Gubernatorial Election held in the State of New York on November 6, 1962" (p. "4", Para. "Seventh" of complaint). It should be further noted that Donald S. Harrington signed the complaint on June 30, 1966 and that his signature was notarized. No evidence to contradict his right as Acting Chairman of the State Com-

mittee of the Liberal Party of the State of New York to bring the action on behalf of the Liberal Party of the State of New York was ever introduced.

The State further contends (p. "9") that plaintiffs-appellees have never established that they have been personally injured by the statute attacked in this proceeding. In this connection we need only refer to the affidavit of plaintiff-appellee, David I. Wells, sworn to August 29, 1966, on file herein, at 46 thereof, which is part of the Record on Appeal, wherein it was clearly stated that the over-all operation of Chapter 980 of the Laws of 1961 of the State of New York causes a distortion in the political character of New York State's representation in the Federal House of Representatives and that that distortion has a seriously adverse effect upon the disposition of legislation which was and is of deep concern to plaintiffs-appellees as well as to all others similarly situated. Furthermore, since the right of Donald S. Harrington to bring this action as Acting Chairman of the State Committee of the Liberal Party of the State of New York has never been denied, we point out as further evidence of injury, that a very substantial number of the members and enrollees of the Liberal Party are residents of Congressional Districts which are seriously under represented in the Congress of the United States as a result of the operation of the statute here under attack.

POINT III

The State's argument that the District Court erred in refusing to permit the existing Congressional District lines to remain in effect for the elections of 1968 and 1970 is wholly lacking in legal merit and runs contrary to the decisions of this Court.

The State points out (p. "3" item "(d)") that a further redistricting will be necessary immediately following the 1970 census. But it is significant to note that such redis-

tricting cannot be used as the basis of Congressional elections in this State until November 1972, and cannot form the basis of the State's representation in Congress until the opening of the 93rd Congress in January 1973, more than five years in the future.

The State contends (p. "5") that "New York will be forced to experience three different sets of Congressional district lines within a six-year period." This may be unfortunate, but had the 1961 law not been violative of the principles of equitable representation, or had the State acted voluntarily between 1964 and 1966 to bring its districting arrangement into line with the constitutional principles made quite clear in *Wesberry* and *Reynolds*, such a situation would have been avoided. Furthermore, this same situation prevails today in at least 11 other states:

California	North Carolina
Florida	Oklahoma
Indiana	Tennessee
Massachusetts	Texas
Missouri	Washington
New Jersey	

In all but two (Oklahoma and Washington) the situation results from the courts having declared existing districting statutes invalid. Indeed, in Indiana, the situation is the direct result of the ruling of this Court in *Duddleston* v. *Grills*, 385 U. S. 455. Furthermore, in eight of these 11 states (all but California, Indiana and New Jersey) new districting statutes have already been enacted. All of these statutes will operate in only two elections: 1968 and 1970.

Throughout the nation's history, apportionment and districting laws based on the census figures gathered at the beginning of each decade have remained the basis of Congressional representation throughout the decade, and were not superseded until after the next census figures became available 10 years later. For example, the census

figures gathered in 1950 formed the basis for the districting laws which governed the elections of 1958 and of 1960 —even though by the time those elections took place, the figures were eight to ten years old. There is, therefore, no reason why figures gathered in 1960 should not be used to establish an apportionment law to govern the elections of 1968 and 1970. Indeed, the State itself favors using an apportionment based on the 1960 census figures: the 1961 statute.

The question really comes down to a choice between *two* alternatives. Since the State has indicated that it is not possible to obtain census figures which are any more recent than 1960, there is no possibility of using updated figures as the basis for the apportionment of seats for the 1968 and 1970 elections. Therefore, the two remaining alternatives are:

A) The 1961 statute—which was based on the 1960 figures.

B) A new statute—which would also be based on the 1960 figures.

Since, under either of these alternative possibilities, the apportionment law to be used for the next two Congressional elections will have to be based on the 1960 census figures, the accuracy of those figures becomes an academic question.

The 1961 statute is demonstrably unfair. The court below ruled that it violates the principles enunciated by this Court in *Wesberry, Reynolds* and subsequent rulings. The district court ordered the New York Legislature to enact a new statute, in conformity with those principles, to govern the two elections which must take place before any apportionment based on 1970 census figures can take effect. The choice, therefore, is between an unfair districting statute based on the latest available figures and a fair statute based on the latest available figures. Under these circumstances,

there can be no doubt as to the proper choice—both morally and legally.

Of further significance herein is the fact that in February, 1966, in *Swann* v. *Adams*, 383 U. S. 210, this Court, dealing with an almost identical plan—to permit continued use of an unconstitutional apportionment for three more years (the exact time span involved in the present case)—held that there was "no warrant for perpetuating . . . an unconstitutional apportionment for three more years".

In the first line of the Statement of the Case (p. "3"), it is noted that the present case was not begun until five years after the enactment of the districting statute. It is true that the statute was enacted in 1961 and that the instant case was filed in 1966. However, the two basic cases upon which this action rests—*Wesberry* and *Reynolds*—were not decided until 1964. Following those decisions, it was plaintiffs' expectation that the New York Legislature would itself act to redraw the State's Congressional district boundaries so as to comply with the constitutional standards therein indicated. When, however, three sessions of the Legislature had passed and no corrective action had been initiated by the legislative leaders of either major party or by the Governor (or indeed, even by any individual member of the New York Legislature), it became obvious that no voluntary compliance would be forthcoming. The within action, therefore, was filed in the light of the failure of the proper State authorities to take any steps toward bringing the State law into conformity with the federal Constitutional requirements. (We note also, in this connection, that the first of those three sessions of the Legislature [1964] was under Republican control; the second [1965] was under Democratic control; the third [1966] was under divided control. This action was filed on July 5, 1966, at the conclusion of the 1966 session, when it had become apparent that changes in political circumstances alone would not suffice to spur the Legislature into corrective action in this area.)

CONCLUSION

The order, judgment and decree of the lower court should be affirmed.

Dated: New York, N. Y., October 25, 1967.

Respectfully submitted,

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